

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

<b>DARYL ARTHUR WITMER,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. CIV-08-1106-D</b>
	)	
<b>SHANE WYATT, Warden, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**REPORT AND RECOMMENDATION**

Plaintiff, a prisoner appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983 alleging constitutional violations stemming from his confinement at the Grady County Detention Center. United States District Judge Timothy D. DeGiusti referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Defendant Susan Winchester has filed a motion to dismiss Plaintiff's claims against her, to which Plaintiff has responded with his own motion to dismiss Defendant Winchester. For the following reasons, it is recommended that Defendant Winchester's motion to dismiss be granted, and that Plaintiff's motion to dismiss be denied as moot.

Plaintiff filed his original complaint on October 16, 2008, and named John Doe/Jane Doe members of the Board of County Commissioners of Grady County as Defendants in this suit, among other Defendants. See Complaint, p. 3.<sup>1</sup> He then filed a document that he called an amended complaint on November 24, 2008, and specifically named Defendant

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<sup>1</sup> Plaintiff has inserted numerous pages into the complaint form used to initiate suit. Thus, instead of using the pre-printed page numbers at the bottom of the complaint form, the undersigned has physically hand-counted the pages of the complaint, and cites to them sequentially in the order in which they appear.

Winchester, in her capacity as a member of the Board of County Commissioners of Grady County, as a Defendant. See Amended Complaint, p. 2. While there has been no showing that the Defendant Winchester has been properly served and she has not answered, she did file a motion to dismiss Plaintiff's claims against her. In her motion to dismiss, Defendant Winchester argues that Plaintiff's claims against her should be dismissed because she did not personally participate in any of the events made the basis of Plaintiff's suit. Defendant's Motion, p. 2. In support, Defendant Winchester notes that she is not currently, and never has been, a member of the Board of County Commissioners of Grady County. Id. at Ex. 1. In response, Plaintiff filed a motion to dismiss Defendant Winchester and explained therein that he named Winchester as a Defendant based upon his erroneous belief that she was a member of the Board of County Commissioners of Grady County. Plaintiff's Motion, p. 1. Plaintiff explicitly requests that all his allegations against Defendant Winchester be dismissed. Id. at 2.

Personal participation is an essential element of a § 1983 claim. Bennett v Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976). As a result, an individual incurs no § 1983 liability for conduct that results in the deprivation of a constitutional right unless an "affirmative link" exists between the deprivation and either the individual's personal participation, her exercise of control or direction, or her failure to supervise. Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988); see also Coleman v. Turpen, 697 F.2d 1341, 1347 n.7 (10th Cir. 1982) (*respondeat superior* generally does not apply to § 1983 cases). Considering the parties' submissions, the undersigned concludes that Defendant Winchester's motion to dismiss

should be granted. Defendant Winchester has shown that she has no personal connection to the events made the basis of Plaintiff's suit, see Defendant's Motion, p. 2, and Plaintiff himself concedes that she should not be a Defendant in this suit and that he erroneously named her as a Defendant. Plaintiff's Motion, pp. 1-2. Accordingly, Defendant Winchester's motion to dismiss Plaintiff's claims against her based upon a lack of personal participation should be considered confessed and granted, and Plaintiff's motion to dismiss his claims against Defendant Winchester should be denied as moot.

Additionally, Plaintiff filed a "Motion for Leave of Court to Amend Petition File Summons for Non-Appearing Defendants," which the undersigned reads as a motion for leave to amend the amended complaint. In that motion, Plaintiff states that he believes his live complaint suffers from several deficiencies and he requests leave to amend it to cure those deficiencies. Plaintiff also submitted several documents as Exhibits 1, 7, and 8, which he asks the Court to consider as a "rebuttal" to the Special Report filed in this action. See Plaintiff's Motion for Leave to Amend, p. 1.

According to Rule 15, a party may amend its pleading once as a matter of right; thereafter it may amend its pleading only with the opposing party's written consent or leave of the court. See United States ex rel. Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1166 (10th Cir. 2009). Plaintiff has already amended his complaint once as a matter of course; therefore, he may only amend his complaint with leave of the Court. "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

After considering the factors set forth in Foman v. Davis, 371 U.S. 178, 182 (1962),

the undersigned concludes that granting leave to amend is not appropriate at this time. Plaintiff has not identified any specific changes he would like to make by amending his complaint, but rather states in his motion for leave to amend that he “now see[s] the many mistakes made in his original and amended Petition,” and gives examples of those “mistakes,” including deficiencies with service of process, improperly seeking class status, and failing to allege constitutional violations committed by the individual Defendants. See Motion for Leave to Amend, p. 1.

The complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Aside from Defendant Winchester, none of the Defendants has challenged the sufficiency of the allegations of Plaintiff’s original or amended complaints, or otherwise argued that Plaintiff has failed to state a claim for relief against them. Thus, at this time, Plaintiff has not demonstrated any need to make changes to his pleading to adequately allege constitutional violations against the Defendants. Plaintiff’s attempt to bring his claims as a class action will be addressed by Judge DeGiusti when he rules on the undersigned’s previous Report and Recommendation concerning Plaintiff’s ability to bring class claims. Accordingly, Plaintiff’s admitted mistake in attempting to bring class claims as a *pro se* litigant creates no need to amend Plaintiff’s pleadings. Further, Plaintiff may address the deficiencies in service without amending his pleadings; therefore, his failure to timely and properly serve some of the Defendants in this suit does not provide a reason for granting Plaintiff leave to amend at this time. Accordingly, the undersigned denies Plaintiff’s motion for leave to amend without prejudice to Plaintiff

filing another motion for leave to amend if one becomes appropriate at a later point in the proceedings.

**RECOMMENDATION**

For the foregoing reasons, it is recommended that: Defendant Winchester's Motion to Dismiss and Brief in Support [Doc. No. 45] be **GRANTED**; in light of this recommendation, it is further recommended that Plaintiff's Motion to Dismiss [Doc. No. 49] be **DENIED** as moot. Finally, Plaintiff's motion for leave to amend [Doc. No. 50] is **DENIED**.

The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by June 1, 2009, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). This Report and Recommendation disposes only of Plaintiff's claims against Defendant Susan Winchester; at this time, all of Plaintiff's claims against all other Defendants remain pending before the undersigned.

**ENTERED this 12<sup>th</sup> day of May, 2009.**

  
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DOYLE W. ARGO  
UNITED STATES MAGISTRATE JUDGE